Goh Hooi Yin v See Geok Heoh & Anor

HIGH COURT (PENANG) — CIVIL SUIT NO 22-359-79
SELVENTHIRANATHAN JC
29 NOVEMBER 1993

Partnership *— Dissolution — Retiring partner assessed to income tax on income prior to dissolution — Whether continuing partner should indemnify retiring partner*

The plaintiff and one Chew Ming Tow, deceased, were equal partners in a business. The partnership was dissolved with effect from 16 April 1973 by a deed of dissolution entered into on 16 June 1973. The plaintiff was the retiring partner and the deceased was the continuing partner. The terms of the deed of dissolution were, inter alia, that the continuing partner would discharge all debts, liabilities and obligations of the partnership and indemnify the retiring plaintiff from all costs, claims and expenses in respect thereof. Subsequent to the dissolution of the partnership, the plaintiff was assessed for tax in respect of the income of the partnership for the 9½ months preceding the dissolution. He paid the tax to the authorities under protest and sought to recover it from the estate of the deceased.

Held, allowing the plaintiff's claim:

(1) In construing the deed of dissolution, it was the intention of the parties to make a clean break of the partnership with effect from the date of dissolution. Any debts, liabilities or obligations of the partnership that accrued prior to the dissolution became those of the deceased as the continuing partner under cl 4 of the deed.

(2) It was the intention of the parties that the income of the partnership for the 9½ months immediately prior to the dissolution would accrue to the continuing partner. Likewise, the continuing partner would be liable for any tax payable in respect of that income and would have to indemnify the plaintiff and keep him indemnified in respect of the tax assessed and paid on that income.

[Bahasa Malaysia summary

Plaintif dan seorang bernama Chew Ming Tow, si mati, adalah pekongsi bersama di dalam suatu perniagaan. Perkongsian itu telah dibubarkan mulai daripada 16 April 1973 melalui suatu surat ikatan pembubaran yang telah disempurnakan pada 16 Jun 1973. Plaintif merupakan pekongsi yang telah bersara, sementara si mati adalah pekongsi yang meneruskan perniagaan itu. Terma-terma surat ikatan pembubaran adalah, antara lain, bahawa pekongsi yang meneruskan perniagaan akan menyelesaikan semua hutang, tanggungan dan obligasi perkongsian itu dan melindungi plaintif yang bersara itu daripada semua kos, tuntutan dan perbelanjaan yang berkenaan dengan perkongsian itu. Selepas pembubaran perkongsian itu, plaintif telah

ditaksir untuk cukai berkenaan dengan pendapatan perkongsian itu untuk 9½ bulan sebelum pembubaran itu. Beliau telah membayar cukai itu kepada pihak berkuasa dengan bantahan dan kemudiannya cuba mendapat balik jumlah itu daripada harta pusaka si mati.

Diputuskan, membenarkan tuntutan plaintif itu:

(1) Dengan mentafsirkan surat ikatan pembubaran itu, adalah menjadi tujuan pihak-pihak yang berkenaan untuk mengadakan suatu penyelesaian yang lengkap bagi perkongsian itu mulai daripada tarikh pembubaran itu. Sebarang hutang, tanggungan atau obligasi perkongsian yang terakru sebelum pembubaran itu menjadi tanggungjawab si mati sebagai pekongsi yang meneruskan perniagaan di bawah fasal 4 surat ikatan itu.

(2) Adalah menjadi tujuan pihak-pihak itu bahawa pendapatan perkongsian itu untuk 9½ bulan sejurus sebelum pembubaran itu akan terakru kepada pekongsi yang meneruskan perniagaan. Dalam cara yang sama, pekongsi yang meneruskan perniagaan itu akan bertanggungan untuk sebarang cukai yang kena dibayar berkenaan dengan pendapatan itu dan beliau mesti melindungi plaintif dan terus melindunginya berkenaan dengan cukai yang ditaksir dan dibayar atas pendapatan itu.]

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02–545–93.]

Cases referred to

1 *Jennings v Jennings* [1898] 1 Ch D 378 (refd)
2 *Stevens v Britten* [1954] 3 All ER 385; [1954] 1 WLR 1340 (refd)
3 *Alagappa Chettiar v Coliseum Cafe* [1962] MLJ 111 (refd)
4 *Commissioners of Inland Revenue v Paget* [1938] 2 KB 25 (refd)

Mahinder Singh Dulku (*Wong Yee Chue* with him) (*Mahinder Singh Dulku, Ismadi & Co*) for the plaintiff.

Khoo Guan Huat (*Skrine & Co*) for the defendants.

Selventhiranathan JC: The plaintiff and one Chew Ming Tow, deceased, were equal partners in a business known as 'United Book Co'. The partnership was dissolved with effect from 16 April 1973 by a deed of dissolution entered into on 16 June 1973. The plaintiff was the retiring partner and the deceased was the continuing partner. The terms of the deed of dissolution were, inter alia, as follows:

(i) the continuing partner shall purchase from the retiring partner for the sum of RM600,000 the share and interest of the retiring partner in the cash in hand and in the current account at the bank and the assets and effects of the partnership passing by delivery;

(ii) that the share and interest of the retiring partner in the goodwill and assets of the partnership except as aforesaid shall be assigned to the continuing partners;

(iii) that the continuing partner shall undertake the payment, discharge and fulfilment of all debts, liabilities and obligations of the partnership; and

(iv) that the retiring partner shall transfer his undivided share (hereinafter called 'his undivided share') in all those pieces or parcels of land now registered in the names of the continuing partner and the retiring partner as co-proprietors and belonging to the said partnership (hereinafter together called 'the said land') to the continuing partner.

Clauses 4 and 5 of the deed of dissolution read:

(4) The continuing partner hereby covenants with the retiring partner to pay, discharge and fulfil all debts, liabilities and obligations of the partnership and at all times hereafter effectually to indemnify and keep indemnified the retiring partner and his personal representatives, estate and effects therefrom and from all proceedings, costs, claims and expenses in respect thereof.

(5) Each of them, the retiring partner and the continuing partner, hereby releases the other from all proceedings, accounts, costs, claims and demands in respect of the said partnership but without prejudice to any rights or remedies under the provisions of this deed.

Subsequent to the dissolution of the partnership, the plaintiff was assessed for tax in respect of the income of the partnership for the 9½ months, ie for the period from 1 July 1972 to 15 April 1973, preceding the dissolution. The plaintiff's share of the tax and penalties amounted to RM32,249.17. He paid the same to the tax authorities under protest and sought to recover it from the estate of the deceased.

The plaintiff gave evidence to the effect that when the deed of dissolution was executed, the accounts of the partnership for the previous year had not been finalized. He accepted RM600,000 as his share and interest in the partnership. He did not receive any income from the partnership for the 9½ months immediately preceding its dissolution. Despite that, he was assessed for income tax in respect of the profits of the partnership during that period. Having resisted the claim by the tax authorities and lost, the plaintiff sought to recover the tax paid from the estate of the deceased as he had not received the income in respect of which he was assessed for tax.

In cross-examination, the plaintiff confirmed that the deceased was his business partner at all material times and that the deceased had also signed the deed of dissolution.

No witnesses were called on behalf of the defendants, the administrators of the estate of the deceased.

Encik Khoo Guan Huat, for the defendants, submitted that the phrase 'debts, liabilities and obligations of the partnership' did not include the income tax paid by the plaintiff, even if the tax was assessed on the partnership income for the 9½ months in question. His reasons were based on the construction of the date of dissolution of the partnership. The assets of the partnership which passed on 16 April 1973 to the deceased would include the partnership income prior to that date. He contended that the plaintiff's share of the partnership income in respect of the period in question was included in the RM600,000 the plaintiff received and he was therefore liable to pay tax on that income.

Encik Khoo submitted a bundle of some 26 authorities in support of the defendants' case. According to him, 'income' would include 'revenue', and 'assets' would also include 'revenue'. It was immaterial whether the sum involved was partnership income, revenue or profits because they all formed part of the assets of the partnership. He referred to s 46 of the Partnership Act 1961 which provides the rules for the settling of accounts between the partners after a dissolution of partnership and submitted that that section was not applicable here as there was an agreement between the partners providing otherwise. He also referred to *Jennings v Jennings*[1] where 'assets' was given a very wide meaning. He submitted that the payment of RM600,000 in a lump sum to the plaintiff to retire from the partnership included the partnership profits for the period in question and since the plaintiff had been paid such profits, he was liable to pay the tax on them. It was irrelevant that the plaintiff had not been paid his share of the income separately.

He submitted further that in Malaysia, a partnership has no separate legal entity, unlike in the United Kingdom where the partners are assessed separately for tax purposes.

He cited in support of his contention *Stevens v Britten*.[2] The crucial question was whether the tax paid by the plaintiff was a partnership debt or liability within the meaning of cl 4 of the deed of dissolution. Under s144(1) of the Income Tax Act 1952 of the United Kingdom, the partnership income and other income are kept separate but they are lumped together in Malaysia. He referred further to the case of *Alagappa Chettiar v Coliseum Cafe*,[3] s 55 of the Income Tax Act 1967, and to various other authorities in his bundle. According to him, since a firm in Malaysia has no separate legal entity and the tax is levied not on the partnership but on the individual, the tax cannot be said to be 'the debts, liabilities and obligations of the partnership' under cl 4 of the deed of dissolution. It was not fair for the continuing partner to pay the share of the income to the retiring partner and to have to pay the tax thereon as well.

Encik Mahinder Singh, for the plaintiff, submitted that 'assets' in para (b) of the preamble to the deed of dissolution was limited to those specified therein and the income for the period in question could not be included within the assets of the partnership as the accounts of the partnership in respect of the specified period had not been determined. Term (ii) of the deed of dissolution provided that the transaction was an assignment and not a sale. The income generated was assigned to the continuing partner. When the plaintiff retired, the continuing partner became the sole proprietor and the assignment of the partnership income became the income of the sole proprietor. He submitted that by the clear words of the deed of dissolution, the plaintiff's share of any prospective income became that of the deceased for which his estate was liable to discharge the tax assessed thereon. Clause 5 of the deed of dissolution further strengthened this submission. The plaintiff was no longer interested in the accounts of the partnership and it did not matter to the plaintiff whether the partnership made any profits or incurred any losses as these would accrue to the surviving partner alone. In his view, Encik Khoo spoke from hindsight

when he said the RM600,000 encompassed the profits from the previous year for the period in question. This was because when the deed of dissolution was entered into, neither the deceased nor the plaintiff knew the true position of the accounts for the previous year as no accounts were taken. Clause 5 of the deed of dissolution went further than cl 4 and brought in the element of tax arising out of the accounts of the partnership. He also referred to *Stevens v Britten*[2] and submitted that, notwithstanding a different provision in the law, the principle was the same in Malaysia. The plaintiff had been assessed to tax on the trading operations of the two partners and even under cl 4 of the deed of dissolution, one could construe the tax as the liability of the partnership.

The deed of dissolution had to be looked at in its entirety for the construction thereof and its effect. The income in question had not crystallized when the deed was executed and it could not be said that at that date that was the income of the plaintiff. He referred to *Commissioners of Inland Revenue v Paget*[4] to support his contention.

Encik Mahinder Singh also referred to s 44 of the Partnership Act 1961 and stated that the proviso to that section was the reason why the plaintiff dropped his claim for his share of the profits of the partnership for the period in question. It was also agreed not to ask for the accounts of the partnership by reason of cl 5 of the deed of dissolution. It was an express term of the deed of dissolution to provide for the indemnification of the plaintiff in respect of all debts, liabilities and obligations of the partnership and from all proceedings, costs, claims and expenses in respect thereof, but the defendants, acting on behalf of the estate of the deceased, refused to so indemnify the plaintiff. In law and in conscience, the defendants ought not to be allowed to have their cake and eat it as well. The defence was a bare denial and nowhere was it stated in the defence that the defendants were not liable to pay the tax assessed.

With every respect to the lengthy submission of Encik Khoo, I have been unable to accept his contention that the plaintiff could not claim to be indemnified in respect of the tax imposed on him pertaining to the income of the partnership for the period in question. The deceased purchased from the plaintiff his share and interest in the cash in hand and in the current account at the bank and the assets and effects of the partnership passing by delivery. The share and interest of the plaintiff in the goodwill and assets of the partnership were assigned to the deceased. The deceased, as continuing partner, undertook the payment, discharge and fulfilment of all debts, liabilities and obligations of the partnership as from 16 April 1973. By cl 3(i) of the deed of dissolution, the plaintiff assigned to the deceased, as continuing partner, all his share and interest in the partnership and the business goodwill, book debts, property and assets thereof other than the said cash assets and effects passing by delivery. Clauses 4 and 5 of the deed of dissolution have already been set out above.

Construing the deed of dissolution as a whole, I was of the view that it was the intention of the parties to make a clean break of the partnership with effect from the date of dissolution. Any debts, liabilities or obligations of the partnership that accrued prior to the dissolution became those of the

deceased as continuing partner under cl 4 of the deed. It was also the intention of the parties that the income of the partnership for the preceding 9½ months immediately prior to the dissolution, the accounts of which were not available at the date of dissolution, would accrue to the continuing partner. Likewise, the continuing partner would be liable for any tax payable in respect of that income and would have to indemnify the plaintiff and keep him indemnified in respect of the tax assessed and paid on that income, pursuant to cl 4. I found further support for this interpretation in cl 5 of the deed of dissolution by which each partner released the other from all proceedings, accounts, costs, claims and demands in respect of the partnership but *without prejudice to any rights or remedies under the provisions of the deed* (emphasis added). Hence, the continuing partner was discharged from all obligations to account for the income of the partnership in respect of the period in question, and where the plaintiff became liable for the payment of tax and other obligations of the partnership after the date of dissolution, cl 4 provided for the continuing partner to indemnify the plaintiff. If, as Encik Khoo contended, the RM600,000 paid to the plaintiff took into account the income of the partnership for the period in question (which income was not yet known at the date of dissolution), there would have been no need to have cl 4 inserted in the deed of dissolution.

I therefore gave judgment for the plaintiff in terms of the statement of claim as finally amended by the consent of the parties on 17 August 1993. Interest at 8%pa was awarded on the judgment sum with effect from 11 April 1983 which was the date of the payment of the tax by the plaintiff. By consent of the parties, costs were awarded to the plaintiff on the sessions court scale.

Claim allowed.

Reported by Kevin Ooi